STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2014
v	No. 312751 Wayne Circuit Court
OTIS PIPES, JR., Defendant-Appellant.	LC No. 11-010441-FC

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Defendant, Otis Pipes, Jr., appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(b)(*ii*) (victim at least 13 but less than 16 years of age and related to actor), and one count of second-degree CSC, MCL 750.520c(1)(b)(*ii*) (victim at least 13 but less than 16 years of age and related to actor). This case arises from allegations that defendant sexually assaulted his granddaughter. The trial court sentenced defendant to 11 to 25 years' imprisonment for each count of first-degree CSC, and 4 to 15 years' imprisonment for the second-degree CSC conviction. We affirm.

I. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he received ineffective assistance of counsel because his trial counsel failed to consult with and call an expert witness in child sexual abuse to testify regarding the forensic-interviewing protocol and other relevant research and failed to adequately cross-examine the prosecution's witnesses regarding the protocol and their failure to adhere to its requirements. Without expert testimony, defendant asserts that the jury had no opportunity to consider the reliability of the complainant's testimony as influenced by the interview tactics used.

To preserve a claim of ineffective assistance of counsel, the defendant must move for a new trial or a *Ginther*[1] hearing. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Failure to do so limits this Court's review to errors apparent on the record. *Id.* Because

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

defendant did not file a motion for a new trial or for an evidentiary hearing, this issue is unpreserved, and review is limited to the record.[2] "Whether [a] defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. We review for clear error a circuit court's findings of fact. We review de novo questions of constitutional law." *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012) (internal citations omitted).

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). "To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Vaughn*, 491 Mich at 670 (quotation omitted), and is given "wide discretion in matters of trial strategy[,]" *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009), quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Trial counsel is responsible for "preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). However, "[d]ecisions regarding whether to call or question witnesses are presumed to be matters of trial strategy," *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012), and this Court does not substitute its judgment for that of trial counsel on matters of trial strategy, *Payne*, 285 Mich App at 190. "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Id.* (quotation omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." *Chapo*, 283 Mich App at 371 (quotation omitted).

Defendant argues that he was deprived of a substantial defense because his trial counsel failed to call an expert witness to explain forensic-interviewing protocols to the jury, the ways in which those protocols were not followed in this case, and the potential dangers of deviating from them. In so arguing, defendant analogizes the facts of this case to those of *People v Trakhtenberg*, 493 Mich 38; 826 NW2d 136 (2012). In *Trakhtenberg*, the defendant was convicted of three counts of second-degree CSC after a bench trial. *Id.* at 43-44. The Michigan Supreme Court held, in pertinent part, that the defendant's trial counsel "fail[ed] to exercise reasonable professional judgment when deciding not to conduct any investigation of the case in the first instance[,]" and, therefore, "no purported limitation on her investigation of the case

[2] Defendant notes in his brief on appeal that the record is clear, and thus, review of this issue is possible without an evidentiary hearing.

[could] be justified as reasonable trial strategy." *Id.* at 52-53. One such limitation was counsel's "fail[ure] to consult with key witnesses who would have revealed weaknesses of the prosecution's case[,]" including an expert witness "to testify regarding the propriety of how the complainant made her allegations." *Id.* at 54. "Perhaps most importantly," the Supreme Court noted, "defense counsel stated at the *Ginther* hearing that she chose not to consult any witnesses or obtain additional evidence *before* she decided to pursue a defense strategy for which she concluded that no further investigation was necessary." *Id.* (emphasis in original).

The *Trakhtenberg* Court remanded for a new trial, having concluded that the defendant was prejudiced by his counsel's deficient performance because "the key evidence that the prosecution asserted against [the] defendant was the complainant's testimony; therefore, the reliability of [the] defendant's convictions was undermined by defense counsel's failure to introduce impeachment evidence and evidence that corroborated [the] defendant's testimony." *Id.* at 56.

Defendant's confession renders *Trakhtenberg* distinguishable from this case. In an interview with Tremayne Burton, the officer-in-charge, Burton asked defendant for a narrative of what occurred between defendant and the complainant. Burton asked defendant, "Tell me what happened with you and [the complainant] on [September 17, 2011]?" Defendant answered:

> Friday night she called me and asked me if I could come pick her up from home. She told me that she had some homework to do on the internet. She wanted to take the block off of her cell phone so she could get on the internet. My wife picked her up Friday evening, [September 16, 2011], and brought her to the house. She came in our room[;] I gave her the cell phone. Her brother [] was in the room. Then [the complainant] told me to meet her in the basement on Saturday morning. She wanted to make a deal with me. The deal was that she wanted to have sex with me to get the cell phone back.
>
> So on Saturday, [September 17, 2011,] I got home from work at about [5:00 a.m.] I went in the basement at about [12:00 p.m.] I sat down right beside [the complainant;] we talked about the deal. I asked if she was sure she wanted to do this[;] she said[, "Y]eah, granddaddy.["] I asked her again if she was sure because I didn't want to get in any trouble. I rubbed her a couple times across her stomach. Then she slid her pants down and got on the bed. I'm still fully dressed. I stood over her. I told her that her mother would kill her if she knew . . . that she was trying to have sex to get the phone back. [3]

Burton asked defendant more pointed questions, and defendant admitted that he "rubbed [the complainant] across the stomach and between her legs." When asked if he rubbed her vagina, defendant responded, "Yes. I call her stomach and vagina the same thing, but it might be a little different." Defendant admitted that he rubbed complainant twice between her legs, that

[3] Defendant's statement appears to contradict itself to the extent it purports to establish that he first gave complainant the cellular telephone and she thereafter proposed a "deal" to get it back.

he touched her vagina, and that he "put [his] hand inside her pants before she pulled them down." When asked if the skin of his hand touched the skin on the complainant's vagina, defendant answered, "Yes. I just rubbed on the outside of her vagina real soft, real gently, that was it." He also admitted to straddling the complainant a couple of months earlier while she was sleeping in his wife's bedroom, at which time he pulled up on the back of her pants and underpants.

When the interview ended, Burton and defendant "reviewed each question and [defendant's] answer and [Burton] let [defendant] read it to make sure [Burton] wrote exactly what [defendant] told [him]. And [defendant] put his initials next to each one of his answers." Defendant's explanation at trial for having made the statement, which he said was untrue, was that he was pressured into giving a false confession because he needed medical assistance for his heart and "was only thinking about one thing, getting to the hospital."

Even if admitting to multiple counts of CSC on one's granddaughter were a reasonable response to the stress of a police interrogation, there was no evidence that defendant actually required or sought medical attention during the interview. Burton testified that defendant did not ask to go the hospital, and that defendant indicated, on an intake form, that he was not "under the influence of drugs, alcohol[,] or any medications." Burton, a former emergency medical technician, testified that he did not know at the time of the interview that defendant had a heart condition, and defendant showed no signs of physical distress or heart problems during the interview. In addition, before the interview began, defendant waived his *Miranda*[4] rights after acknowledging that he understood those rights.

Because defendant confessed, we find he cannot establish prejudice and that this case is distinguishable from *Trakhtenberg*, 493 Mich at 56-57. Had defendant's trial counsel called an expert witness to cast doubt on the complainant's credibility, it was not reasonably probable that the jury would have weighted the expert testimony more heavily than defendant's confession; therefore, defendant was not deprived of a "substantial defense" by his counsel's failure to call an expert witness to impeach the complainant's credibility. *Chapo*, 283 Mich App at 371. Because "the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense[,]" *Payne*, 285 Mich App at 190 (quotation omitted), reversal on the basis that defendant received ineffective assistance of counsel is not warranted.[5]

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[5] To the extent defendant argues that his trial counsel was ineffective by failing to adequately cross-examine the prosecution's witnesses regarding forensic-interviewing protocols (which he summarily asserts without further explanation), we conclude that defendant has failed to establish a reasonable probability of a different outcome in light of defendant's confession. See *Uphaus*, 278 Mich App at 185.

II. SENTENCING

Defendant next argues that the trial court violated his rights under the Sixth and Fourteenth Amendments by engaging in judicial fact-finding that increased his minimum sentence when it scored offense variables (OVs) 3, 4, and 10.

To be preserved for appellate review, an issue challenging the scoring of the sentencing guidelines must have been raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. MCL 769.34(10); MCR 6.429(C); *People v Jones*, 297 Mich App 80, 83; 823 NW2d 312 (2012). Defendant did not object to the trial court's scoring decision. Accordingly, he failed to preserve his challenges. We review unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). A plain error affected a defendant's substantial rights if the error affected the outcome of the proceedings. *Vaughn*, 491 Mich at 665. We review the trial court's factual findings for clear error, *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), and we review questions of law de novo, *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

A sentencing court must, absent substantial and compelling reasons, impose a minimum sentence, not to exceed two-thirds of the statutory maximum, within the statutory guidelines for defendants convicted of enumerated[6] felonies. MCL 769.34(2)(b); MCR 6.425(D); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007); *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence," *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), citing *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006), and may rely on reasonable inferences from the record, *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012). Here, defendant does not challenge whether the facts as found by the trial court were sufficient to meet the scoring criteria for OV 3, 4, or 10. Instead, he challenges the trial court's authority to engage in such fact-finding.

"[O]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Drohan*, 475 Mich at 150, quoting *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). However, "[a]s long as the defendant receives a sentence within [the] statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *People v Herron*, 303 Mich App 392; ___ NW2d ___ (Docket No. 309320, issued December 12, 2013), lv pending, slip op at 4, quoting *Drohan*, 475 Mich at 164.

Last year, the United States Supreme Court held that any fact that increases a mandatory minimum sentence is an element of a crime, as opposed to a sentencing factor, "that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v United States*, 570 US ___; 133 S Ct 2151, 2155; 186 L Ed 2d 314 (2013). Following the release of *Alleyne*, this Court held that, rather than permitting judicial fact-finding in order to set a mandatory minimum

[6] MCL 777.11 *et seq.*

sentence, Michigan's legislative sentencing guidelines are within "the traditional wide discretion accorded trial courts to establish a minimum sentence within a range authorized by law as determined by a jury verdict or a defendant's plea." *Herron*, slip op at 7. For this reason, this Court held that Michigan's sentencing guidelines are consistent with *Alleyne* and do not violate the Sixth Amendment. *Id.* *Herron* is binding on this Court. See MCR 7.215(J).

Because defendant's convictions are not punishable by mandatory minimum penalties, *Alleyne* does not apply to the facts of this case according to this Court's decision in *Herron*. Defendant's guidelines range was 81 to 135 months for each first-degree CSC conviction, and 29 to 57 months for the second-degree CSC conviction, and he was sentenced to 11 to 25 years' (132 to 300 months') imprisonment for each count of first-degree CSC and 4 to 15 years' (48 to 180 months') imprisonment for the second-degree CSC conviction. If a minimum sentence is within the appropriate guidelines, this Court must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Gibbs*, 299 Mich App 473, 484; 830 NW2d 821 (2013). Because defendant's sentences for each conviction are within the applicable guidelines ranges, this Court must affirm his sentences.

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering